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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BORIS JAMES DAVISON et al.,

Plaintiffs and Respondents, **A138953**

v. **(San Francisco County Super. Ct. No. CGC10497727)**

STEPHENS INSTITUTE,

Defendant and Appellant.

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Appellant Stephens Institute, doing business as the Academy of Art University (the Academy), appeals from a trial court order denying its motion to compel arbitration (Code Civ. Proc., § 1281.2).[1] We conclude the Academy failed to establish the existence of an agreement to arbitrate and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Academy "is a private university founded in San Francisco in 1929, which offers degree and certificate programs in fine arts." It employs "both full-time and part-time faculty." Plaintiff Jorge Trelles (plaintiff or Trelles) was a part-time instructor at the Academy in 2007, 2011, and 2012.

[1] Unless noted, all further statutory references are to the Code of Civil Procedure. We grant Trelles's unopposed request for judicial notice of the trial court's register of actions.

Trelles filed a proposed class action complaint against the Academy on behalf of non-salaried part-time instructors alleging claims for: (1) breach of contract for failure to pay for hours worked; (2) failure to pay minimum wages; (3) waiting time penalties; (4) failure to maintain and provide accurate itemized wage statements; (5) failure to reimburse business expenses; and (6) unlawful business practices. The Academy answered the complaint. The court consolidated the case with *Davison v. Academy of Art University Foundation*, San Francisco Superior Court case No. CGC-10-497727 (*Davison*) and later preliminarily approved a settlement in *Davison* which excluded the proposed class claims of salaried part-time instructors at issue in this case. The parties conducted discovery and litigated class certification issues.

The Academy's Motion to Compel Arbitration

Trelles declined the Academy's request to arbitrate and the Academy moved to compel arbitration, claiming Trelles "signed and entered into a written agreement to arbitrate all disputes arising out of his employment." The Academy argued Trelles "signed multiple Agreements to Arbitrate . . . which require arbitration of any dispute arising out of or relating to the employment relationship or the termination thereof." As relevant here, the Academy attached the following documents to its motion:

- A 2011 Part Time Faculty Contract Agreement (Employment Agreement) providing in relevant part: "The Academy hereby employs [ ] Trelles ('Instructor') and Instructor hereby accepts part-time employment with the Academy for . . . compensation[.]" Paragraph 7 of the Employment Agreement states, "By accepting employment with the Academy, Instructor agrees to be bound by the Academy's Arbitration Program. Instructor is required to sign a separate document entitled Agreement to Arbitrate and Faculty Manual Acknowledgement, attached . . . as 'Exhibit A' and 'Exhibit B[.]'" Exhibit A, the Agreement to Arbitrate, requires Trelles and the Academy to arbitrate "a dispute arising out of or relating to the employment relationship or the termination thereof" and incorporates the Academy's Arbitration Policy and Procedures. Paragraph 10 of the Employment Agreement provides, "This Agreement is not enforceable by either Party without the signatures of Jorge Trelles and the President

of the Academy. . . ." The Academy's president did not sign the Employment Agreement.

- A September 2011 email (2011 agreement) from the Academy to "Faculty" noting Trelles "has responded to the electronic agreement with the acceptance of YES." The 2011 agreement recites the terms of the Employment Agreement and Exhibits A and B. The Academy's president did not sign the 2011 agreement.

- An August 2012 email (2012 agreement) from the Academy to "Faculty" noting Trelles "has responded to the electronic agreement with the acceptance of YES." The 2012 agreement recites the terms of the Employment Agreement and Exhibits A and B.[2] The Academy's president did not sign the 2012 agreement.

Trelles's Opposition and the Academy's Reply

In opposition, Trelles argued, among other things, there was "no enforceable agreement to arbitrate" because "three of the agreements" were "not signed by either [the Academy] or Mr. Trelles, as required by the agreements' terms[.]" Trelles denied signing the Employment Agreement and noted his signature did "not appear" on the 2011 and 2012 agreements. He also argued all three agreements lacked "the required signature" of the Academy's president.

In reply, the Academy contended Trelles "bound himself to the [Employment] Agreement" and the 2012 agreement by "executing his acceptance . . . electronically" and impliedly accepted these agreements by working at the Academy after receiving them. The Academy conceded its president did not sign the Employment Agreement or the 2012 agreement, but claimed "an unsigned written arbitration agreement [was] enforceable" under the Federal Arbitration Act (FAA) and, as a result, the absence of the president's signature "ha[d] no effect on the agreements' enforceability."

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[2] Both parties signed an Independent Contractor Agreement (ICA) requiring the arbitration of "[a]ny dispute . . . regarding or arising out of" the ICA "or regarding the interpretation, enforcement or alleged violation of" the ICA. The court determined the ICA did "not contain an arbitration clause pertaining to the claims at issue[.]" The Academy does not challenge that finding on appeal.

The Court's Denial of the Motion to Compel Arbitration

The court denied the Academy's motion to compel arbitration. As relevant here, the court determined the Academy had "not met its burden of presenting evidence of an enforceable arbitration agreement" because "each of the relevant agreements regarding Plaintiff's employment" with the Academy "require a signature from both Plaintiff and the President of [the Academy] in order to be effective. [The Academy] has not shown that any of these agreements [was] signed by the President of [the Academy], such that they are not enforceable."

DISCUSSION

Section 1281.2 governs petitions to compel arbitration. It provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists*, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement." (Italics added.)

As the party seeking to compel arbitration, the Academy "bears the burden of establishing the existence of a valid agreement to arbitrate" by a preponderance of the evidence. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356 (*Banner*); *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 15.) In ruling on a motion to compel arbitration, "[t]he trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion[.]" (*Banner, supra,* 62 Cal.App.4th at pp. 356-357.) "'Whether the parties formed a valid agreement to arbitrate is determined under general California contract law. [Citations.]' . . ." (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 348.)

"'There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial

rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]'" (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60 (*Avery*), quoting *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.) The parties urge us to apply a de novo standard of review. They are correct. "Where there is no 'factual dispute as to the language of the agreement' [citation] or 'conflicting extrinsic evidence' regarding the terms of the contract [citation], our standard of review of a trial court order granting or denying a motion to compel arbitration under section 1281.2 is de novo. [Citations.] Such is the case here." (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1061-1062; see also *Rebolledo v. Tillys, Inc.* (2014) 228 Cal.App.4th 900, 912 (*Rebolledo*) [applying de novo standard of review]).

I.

General Principles

Courts have long recognized "the strong public policy in favor of arbitration under both federal and California law. [Citations.]" (*Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1069 (*Crowley*).) "But the public policy in favor of arbitration has a crucial caveat" — it applies only to disputes the parties have agreed to arbitrate [citation]." (*Id.* at p. 1069.) As numerous courts have observed, "[t]he right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. [Citations.] There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate. [Citation.]" (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653; see also *Crowley, supra,* 158 Cal.App.4th at p. 1069.)

Contractual arbitration "only comes into play when the parties to the dispute have agreed to submit to it. . . . [A]s a matter of logic the asserted absence of contractual consent renders arbitration, by its very definition, inapplicable to resolve the issue." (*Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 Cal.App.3d 1406, 1414.) "'Absent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived.'" (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569.) The trial court's "first consideration in connection with

contractual arbitration is to determine the existence . . . of the agreement to arbitrate." (Knight et al., Cal. Practice Guide: Alternate Dispute Resolution (The Rutter Group 2013) ¶ 5:8, p. 5-5 (Rutter); *Tiri v. Lucky Chances, Inc.* (2014) 171 Cal.Rptr.3d 621, 627.)

II.

The Academy Failed to Establish the Existence of an Agreement to Arbitrate

As relevant here, the court denied the Academy's motion to compel arbitration because "each of the relevant agreements regarding Plaintiff's employment" — the Employment Agreement, and the 2011 and 2012 agreements — "require a signature from both Plaintiff and the President of [the Academy] in order to be effective" and the Academy did not "show[ ] that any of these agreements were [*sic*] signed by the President of [the Academy] . . . ." As described above, the Employment Agreement and the 2011 and 2012 agreements required Trelles to "agree[ ] to be bound by the Academy's Arbitration Program" but each agreement also states "[t]his Agreement is not enforceable by either Party without the signatures of Jorge Trelles and the President of the [ ] Academy." The Academy concedes its president did not sign these agreements.

The Employment Agreement and the 2011 and 2012 agreements are not enforceable without the signature of the Academy's president. Because the Academy's president did not sign the relevant agreements, there is no agreement to arbitrate. Numerous cases support our conclusion. (See, e.g., *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89 (*Marcus & Millichap*); *Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal.App.4th 1153, 1159-1160 [affirming denial of motion to compel arbitration where employee handbook containing the arbitration agreement contemplated signature from the employee and employee did not sign]; *Roth v. Garcia Marquez* (9th Cir. 1991) 942 F.2d 617, 626-627 [agreement not binding where author's signature was a condition precedent]; see also *Rebolledo, supra,* 228 Cal.App.4th at p. 923 [modification to original employment

agreement signed by employee was unenforceable because it did not, as required, contain the signatures of three of the employer's executives].)

Marcus & Millichap is instructive. There, apartment complex buyers sued the sellers and the seller's agent, alleging "sellers had misrepresented and concealed certain plumbing problems in the complex." (*Marcus & Millichap, supra,* 68 Cal.App.4th at p. 85.) The buyers and sellers' purchase agreement contained an arbitration clause providing: "'ARBITRATION OF DISPUTES: If a controversy arises with respect to the subject matter of this Purchase Agreement or the transaction contemplated herein (including but not limited to the parties' rights to . . . the payment of commissions as provided herein), *Buyer, Seller and Agent agree* that such controversy shall be settled by final, binding arbitration . . ." (*Id.* at p. 86.) "Although the buyers initialed this provision, the sellers did not. Moreover, the sellers did not agree to arbitration in any of the various counteroffers that went back and forth between the parties." (*Ibid.*)

The seller's agent moved to compel arbitration, relying on "the purchase agreement between the buyers and sellers." (*Marcus & Millichap, supra,* 68 Cal.App.4th at p. 86.) The trial court denied the motion for lack of "'a binding, enforceable agreement to arbitrate the controversy'" and the appellate court affirmed. (*Id.* at p. 87.) It concluded the purchase agreement "contemplated that the arbitration of disputes provision would be effective only if both [parties] assented to that [particular] provision. Since the [parties] did not assent to this [particular] provision the parties did not agree to binding arbitration." (*Id.* at p. 91.) As the *Marcus & Millichap* court explained, the motion "to compel arbitration was based entirely on the arbitration clause in the purchase agreement between the sellers and buyers. As we have indicated, although the buyers initialed the arbitration clause as part of their offer to purchase the property, the sellers never initialed this provision or otherwise indicated they accepted this provision in their counteroffers." (*Id.* at p. 89.)

The same is true here. As in *Marcus & Millichap*, the Employment Agreement and the 2011 and 2012 agreements contemplated they would be enforceable only "if both [parties] assented[.]" (*Marcus & Millichap, supra,* 68 Cal.App.4th at p. 91.) And

because the Academy's president did not sign these documents, "the parties did not agree to binding arbitration." (*Ibid.*) The Academy's attempt to distinguish *Marcus & Millichap* by arguing the "agreements are enforceable despite not being signed by the Academy's president" fails.

The Academy claims it satisfied its minimal burden of demonstrating a "valid agreement to arbitrate . . . exists" by attaching the agreements to its motion to compel arbitration. The Academy is wrong. "The existence of an agreement to arbitrate is a condition precedent to enforcement" and "lack of agreement is ground to refuse arbitration: '(A)rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' [Citations.] [¶] Moreover, the fact a written agreement contains an arbitration clause does not itself determine whether the parties ever entered into a valid contract of which the arbitration clause is a part. [Citation.]" (Rutter, *supra*, ¶ 5:78, p. 5-64.9.) The Academy's recitation of basic principles applicable to contract formation does not alter our conclusion.

The Academy contends its president's failure to sign the relevant agreements is immaterial for several reasons, none of which is persuasive. Relying on *Dallman Supply Co. v. Smith-Blair, Inc.* (1951) 103 Cal.App.2d 129, 132 (*Dallman*) and *Harper v. Goldschmidt* (1909) 156 Cal. 245, 250 (*Harper*), the Academy argues Trelles's signature on the agreements created a binding agreement to arbitrate. In *Dallman*, the trial court determined a letter signed by the plaintiff but not the defendant constituted a contract because there was "ample evidence from which the court could find that defendant accepted the letter and acted upon it." (*Dallman*, *supra*, 103 Cal.App.2d at p. 132.) *Dallman* does not assist the Academy. Unlike the letter in *Dallman*, the Employment Agreement and the 2011 and 2012 agreements contained an express condition precedent requiring the signature of the Academy's president. *Harper*, which concerned the statute of frauds, is distinguishable. (See *Harper, supra,* 156 Cal. at p. 250.)

The Academy claims its president's signature was not required to create a binding arbitration agreement because the Academy "performed its part of the Employment

Agreements by employing Trelles."[3] The Academy relies on *Sparks v. Mauk* (1915) 170 Cal. 122 (*Sparks*), but its reliance is misplaced. In *Sparks*, the parties entered into an agreement regarding the repurchase of plaintiff's fuel and feed business. The defendant signed the agreement, but plaintiff did not. In reliance on the agreement, plaintiff "took possession of and conducted the business, had a valuation put upon the stock on hand—grain, fuel, etc[.]" (*Id.* at p. 123.) When plaintiff moved to enforce the agreement, the defendant claimed the agreement was "not complete and therefore unenforceable" because "the contract contemplated a signing by both parties" and plaintiff did not sign it. (*Ibid.*)

The *Sparks* court noted the general rule that "where the contract contemplates the execution of it by signing either party has the right to insist upon the condition, and mere acts of performance upon the part of one who has not signed will not validate the contract." (*Sparks, supra*, 170 Cal. at p. 123.) The court, however, concluded the defendant was estopped to object that plaintiff had not signed the agreement because plaintiff had relied on the agreement and had "changed his condition" by abandoning an action on a promissory note as part of the parties' settlement and by taking possession of the property and operating the business. (*Ibid.*) *Sparks* does not assist the Academy for two reasons. First, it restates the general rule — which applies here — that where a contract contains a condition precedent requiring a party's signature "mere acts of performance upon the part of one who has not signed will not validate the contract." (*Ibid.*) Second, *Sparks* is distinguishable. Here and in contrast to *Sparks*, the Academy's "mere acts of performance" — allowing Trelles to teach and paying him — cannot validate the agreements without the required signature.

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[3] We are not persuaded by the Academy's reliance on Civil Code section 3388, which provides, "[a] party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance." Civil Code section 3388 cannot negate a requirement the agreements explicitly impose, i.e., that both parties consent to the agreements by signing them.

According to the Academy, arbitration is required because it intended to be bound by the agreements and demonstrated its "consent to be bound[.]" We disagree. Whether the Academy intended to be bound or demonstrated its "consent to be bound" is not dispositive because each agreement explicitly provided it would not be binding until signed by the President of the Academy. The parties' signatures — including that of the Academy's president — were a condition precedent to a binding agreement. (See Civ. Code, § 1436.) Emailing Trelles "a confirmation and copy of each executed Agreement[,]" permitting him to teach, and paying him does not constitute a signature.

Relying on *Angell v. Rowlands* (1978) 85 Cal.App.3d 536 (*Angell*), the Academy claims it did not "refuse to sign the Agreements, but merely failed to sign" them. Whatever this means, it is a distinction without a difference, and the Academy's reliance on *Angell* is misplaced. The rule from *Angell* is a party seeking to invalidate a contract not signed by all parties must show "either by parol or express condition, that the contract was not intended to be complete until all parties had signed." (*Angell, supra*, 85 Cal.App.3d at p. 542, italics added.) Other courts have articulated this principle as follows: "When it is clear, both from a provision that the proposed written contract would become operative *only* when signed by the parties as well as from any other evidence presented by the parties that both parties contemplated that acceptance of the contract's terms would be signified by signing it, the failure to sign the agreement means no binding contract was created." (*Banner, supra*, 62 Cal.App.4th at p. 358.)

Here, the Employment Agreement and the 2011 and 2012 agreements contained an "express condition" providing the agreements would not be enforceable unless signed by both Trelles and the President of the Academy. (*Angell, supra*, 85 Cal.App.3d p. 542.) In other words, the signatures of both parties "were contemplated as being a condition precedent to the validity of the [agreements]." (*Id.* at p. 541, citation omitted.) Because the agreements clearly state they "would become operative *only* when signed by the parties[,]" the President of the Academy's failure to sign the agreements "means no

binding contract[s] [were] created." (*Banner, supra,* 62 Cal.App.4th at p. 358; see also *Helperin v. Guzzardi* (1951) 108 Cal.App.2d 125, 128.)[4]

The Academy also argues the FAA governs and does "not require a signature for a written arbitration agreement to be enforceable." Numerous courts have rejected this argument. In *Banner*, the appellate court held: "the FAA does not apply until the existence of an enforceable arbitration agreement is established under state law principles involving formation, revocation and enforcement of contracts generally. [Citation.]" (*Banner, supra,* 62 Cal.App.4th at p. 357.) And more recently, in *Avery,* the appellate court explained, "[a]lthough the FAA preempts any state law that stands as an obstacle to its objective of enforcing arbitration agreements according to their terms . . . we apply general California contract law to determine whether the parties formed a valid agreement to arbitrate their dispute [citations]." (*Avery, supra,* 218 Cal.App.4th at pp. 59-60.)

We conclude the Academy failed to prove the existence of an agreement to arbitrate. Having reached this conclusion, we need not address the parties' other arguments.

DISPOSITION

The order denying the Academy's motion to compel arbitration is affirmed. Jorge Trelles shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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[4] We decline to consider the Academy's argument that it could "waive the signature requirement as the party meant to be protected by the condition precedent" because the Academy did not raise this argument in the trial court. (*Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830 ["reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court"].)

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.